Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS 24C-40–11 OF 2015 AND 24C-41–12 OF 2015
LEE SWEE SENG J
15 MARCH 2016

Civil Procedure — Setting aside — Adjudicator's decision made under the Construction Industry Payment and Adjudication Act 2012 — Whether decision void because it was only released to parties after payment of GST for arbitration centre's fees — Whether maxim noscitur a sociis applied — Whether adjudicator had jurisdiction to decide on payment claims when construction contract had already been terminated — Whether adjudicator acted in breach of rules of natural justice

IRDK Ventures Sdn Bhd ('the respondent') had awarded Econpile (M) Sdn Bhd ('the claimant') a construction contract. The claimant claimed payment for works done under the contract by serving a payment claim for RM4,035,381.87, which was the sum total of two payment claims, namely payment certificate No 5R1 ('the payment certificate') amounting to RM1,805,866.65 and progress claim No 6 ('the progress claim') amounting to RM2,229,515.22, on the respondent. The respondent refuted the payment claims on the grounds that the claimant's employment had been terminated by the architect. As such the respondent argued that it was not bound to make any payment to the claimant. Consequently, the claimant filed an adjudication claim against the respondent in accordance with the procedure laid down in the Construction Industry Payment and Adjudication Act 2012 ('the Act'). The respondent filed its adjudication response disputing the whole of the adjudication claim. The adjudicator allowed the claimant's claim under the payment certificate but dismissed the second progress claim because it was premature. The adjudicator also awarded interest of 4.2% on the adjudicated sum with costs. Pursuant to s 18(1) of the Act the adjudicator decided that the respondent would bear the whole of the costs, which included the sum of RM43,053.06 being the adjudicator's fees, RM9,127.26 being the arbitration centre's fees (inclusive of GST) and RM55,500 being party and party costs. The claimant has now applied to enforce the adjudicator's decision. However, the respondent, on the other hand, has applied to set aside the adjudicator's decision. By consent of the parties these two applications were heard together with the respondent's setting aside application being heard first. In the setting aside application the respondent submitted that the adjudication decision was void because it had only been released to the parties after the payment of GST for the arbitration centre's fees was paid. It was the respondent's argument that

s 19 of the Act only allowed the adjudicator to withhold releasing his decision if his fees and expenses were not paid and not the fees of the arbitration centre as had occurred in this case. The respondent further submitted that the adjudicator did not have the jurisdiction to decide on the payment claims because the claimant's construction contract had already been terminated. The respondent argued that once a construction contract had been terminated, adjudication was no longer available and parties would have to proceed with arbitration or litigation to resolve pending claims. The claimant submitted that the adjudicator had delivered his decision within the time as agreed by the parties pursuant to s 12(2) of the Act.

Held, dismissing the application to set aside the adjudication decision and allowing the claimant's application to enforce the adjudication decision with costs of RM10,000:

(1) It was clear from the agreed terms of appointment of the adjudicator that the parties had agreed to the adjudicator withholding delivery of his decision until all the outstanding fees and expenses, including any taxes imposed by the government had been fully settled. In the present case, the adjudicator had released his decision after he had been formally informed by the arbitration centre that it had received the cheque for the outstanding taxes from the respondent. The respondent's argument that s 19 of the Act only allowed the adjudicator to withhold releasing his decision if his fees and expenses were not paid and not the fees of the arbitration centre, loses its sting because the standard terms of appointment of the adjudicator state that the adjudicator was entitled to exercise a lien on his decision until any outstanding fees and expenses, including the arbitration centre's administrative fee and any taxes had been paid in accordance with s 19(5) of the Act. The legal maxim *noscitur a sociis* ought to be applied to yield an interpretation that would best promote the purpose or object of the rule. Applying this maxim to the purpose of the Act, which was to promote the efficient delivery of an adjudication decision, it made good sense that not just the adjudicator's fees and expenses were to be paid but also that GST on the center's fees should be paid as well. If GST on the adjudicator's fees was to be paid before releasing of his decision, then by extension and giving the section an expansive interpretation to promote the purpose of the Act, the fees and expenses and expenses of the arbitration centre should also by the same token be paid. The adjudication decision was thus validly made, delivered and released to the parties (see paras 16, 24–25, 27–28, & 49).

(2) If the Legislature had wanted the Act to cease to apply upon the termination of the construction contract, it could easily have stated so but it did not. In any case, once the matter had come before the adjudicator for adjudication of the two payment claims and payment responses, the adjudicator was entitled under s 27(3) of the Act to

proceed and complete the adjudication proceedings. From the rationale and purpose perspective of the Act, there was no good reason to exclude its application once the construction contract had been terminated. In effect under the Act, an adjudication was premised on there being a payment claim, and once such a claim was made it was for the adjudicator to decide whether he had the jurisdiction to hear the adjudication claim (see paras 51, 55–56 & 63–64).

(3) In arriving at his decision on interest to be awarded, the adjudicator could not be said to have acted in breach of the rules of natural justice (see paras 89–90).

[Bahasa Malaysia summary

IRDK Ventures Sdn Bhd ('responden') telah mengawardkan Econpile (M) Sdn Bhd ('penuntut') satu kontrak pembinaan. Penuntut menuntut bayaran untuk kerja yang dilakukan di bawah kontrak itu dengan menyerahkan tuntutan bayaran sejumlah RM4,035,381.87, yang merupakan jumlah keseluruhan untuk dua tuntutan bayaran, iaitu perakuan bayaran No 5R1 ('perakuan pembayaran tersebut') berjumlah RM1,805,866.65 dan tuntutan pelaksanaan No 6 ('tuntutan pelaksanaan') berjumlah RM2,229,515.22, ke atas responden. Responden menyangkal tuntutan-tuntutan bayaran tersebut atas alasan bahawa pekerjaan penuntut telah ditamatkan oleh arkitek. Oleh itu responden berhujah bahawa ia tidak terikat untuk membuat apa-apa bayaran kepada penuntut. Akibat itu, penuntut telah memfailkan tuntutan adjudikasi terhadap responden menurut prosedur yang dinyatakan dalam Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta tersebut'). Responden telah memfailkan jawapan adjudikasinya yang mempertikaikan keseluruhan tuntutan adjudikasi itu. Adjudikator telah membenarkan tuntutan penuntut di bawah perakuan bayaran tetapi telah menolak tuntutan pelaksanaan kedua kerana ia adalah pramatang. Adjudikator itu juga telah mengawardkan faedah 4.2% ke atas jumlah yang diadjudikasi dengan kos. Menurut s 18(1) Akta tersebut adjudikator tersebut memutuskan bahawa responden akan menanggung keseluruhan kos, yang termasuk jumlah RM43,053.06 iaitu fi adjudikator, RM9,127.26 iaitu fi pusat timbang tara (termasuk CBP) dan RM55,500 iaitu kos pihak dan pihak. Penuntut kini memohon untuk menguatkuasakan keputusan adjudikator. Walau bagaimanapun, responden, sebaliknya, telah memohon untuk mengetepikan keputusan adjudikator. Dengan persetujuan pihak-pihak dua permohonan tersebut telah didengar bersama dengan permohonan penepian responden yang didengar terlebih dahulu. Dalam permohonan penepian itu responden berhujah bahawa keputusan adjudikasi adalah tidak sah kerana ia telah hanya diberikan kepada pihak-pihak selepas bayaran CBP untuk fi pusat timbang tara dibayar. Ia adalah hujah responden bahawa s 19 Akta tersebut hanya membenarkan adjudikator menahan daripada memberikan keputusannya jika fi dan perbelanjaannya tidak dibayar dan bukan fi pusat timbang tara seperti

yang berlaku dalam kes ini. Selanjutnya responden berhujah bahawa adjudikator tidak mempunyai bidang kuasa untuk memutuskan tentang bayaran tuntutan kerana kontrak pembinaan penuntut telahpun ditamatkan. Responden berhujah bahawa selepas kontrak pembinaan ditamatkan, adjudikasi tidak lagi tersedia dan pihak-pihak perlu meneruskan dengan timbang tara atau ligase untuk menyelesaikan tuntutan yang belum selesai. Penuntut berhujah bahawa adjudikator telah menyampaikan keputusannya dalam tempoh yang dipersetujui oleh pihak-pihak menurut s 12(2) Akta tersebut.

Diputuskan, menolak permohonan untuk mengetepikan keputusan adjudikasi dan membenarkan permohonan penuntut untuk menguatkuasakan keputusan adjudikasi dengan kos RM10,000:

(1) Ia adalah jelas daripada terma-terma pelantikan adjudikator yang dipersetujui bahawa pihak-pihak tersebut telah bersetuju dengan adjudikator menahan penyampaian keputusannya sehingga semua bayaran dan perbelanjaan tertunggak, termasuk apa-apa cukai dikenakan oleh kerajaan telah diselesaikan sepenuhnya. Dalam kes ini, adjudikator telah memerikan keputusannya selepas dia telah diberitahu secara rasmi oleh pusat timbang tara bahawa ia telah menerima cek untuk cukai tertunggak daripada responden. Hujah responden bahawa s 19 Akta tersebut hanya membenarkan adjudikator menahan daripada menyampaikan keputusannya jika fi dan perbelanjaannya tidak dibayar dan bukan fi pusat timbang tara, hilang pentingnya kerana terma-terma pelantikan adjudikator yang standard menyatakan bahawa adjudikator berhak melaksanakan lien atas keputusannya sehingga apa-apa fi dan perbelanjaan tertunggak, termasuk fi pentadbiran pusat timbang tara dan apa-apa cukai yang telah dibayar menurut s 19(5) Akta tersebut. Maksim perundangan *noscitur a sociis* patut diguna pakai untuk menghasilkan pentafsiran yang boleh memperkenalkan maksud atau matlamat peraturan itu. Dengan mengguna pakai maksim ini bagi tujuan Akta tersebut, yang mana adalah untuk menggalakkan penyampaian berkesan suatu keputusan adjudikasi, ia adalah munasabah bahawa bukan sahaja fi dan perbelanjaan adjudikator perlu dibayar tetapi juga bahawa CBP berhubung fi pusat itu patut dibayar juga. Jika CBP ke atas fi adjudikator perlu dibayar sebelum menyampaikan keputusannya, maka melalui lanjutan dan memberikan seksyen itu penafsiran yang luas untuk menggalakkan tujuan Akta tersebut fi dan perbelanjaan itu dan perbelanjaan pusat timbang tara sepatutnya juga dibayar. Keputusan adjudikasi dengan itu telah dibuat, disampaikan dan diberikan dengan sah kepada pihak-pihak (lihat perenggan 16, 24–25, 27–28, & 49).

(2) Jika badan perundangan menginginkan Akta tersebut untuk berhenti terpakai ke atas kontrak penamatan berhubung pembinaan itu, ia boleh dinyatakan dengan mudah tetapi ia tidak berbuat sedemikian. Dalam

apa keadaan, setelah perkara itu dikemukakan di hadapan adjudikator untuk adjudikasi dua bayaran tuntutan dan bayaran maklum balas, adjudikator itu berhak di bawah s 27(3) Akta tersebut untuk menerus dan menyelesaikan prosiding adjudikasi. Berdasarkan persepsi rasional dan tujuan Akta tersebut, tiada sebab kukuh untuk mengecualikan permohonannya setelah kontrak pembinaan ditamatkan. Berkuat kuasa di bawah Akta ini, adjudikasi itu yang dibuat berdasarkan adanya tuntutan pembayaran, dan jika apa-apa tuntutan yang dibuat ia adalah untuk adjudikator untuk membuat keputusan sama ada beliau mempunyai bidang kuasa untuk mendengar tuntutan adjudikasi (lihat perenggan 51, 55–56 & 63–64).

(3) Untuk tiba pada keputusan beliau berhubung faedah yang diawardkan, adjudikator tidak boleh dikatakan telah bertindak melanggar rukun keadilan asasi (lihat perengan 89–90).]

Notes

For cases on setting aside in general, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 8307–8320.

Cases referred to

A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd [1999] Lexis Citation 3443; [2000] 16 Const LK 199, QBD (refd)

AU v AV [2006] SGSOP 9, HC (refd)

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282, QBD (folld)

Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd [2015] SGCA 42, CA (refd)

Cubitt Building and Interiors Ltd v Fleetglade Ltd [2006] EWHC 3413, QBD (refd)

Epping Electrical Co Ltd v Briggs and Forrester (Plumbing Services) Ltd [2007] EWHC 4 (TCC); [2007] BLR 126, QBD (refd)

Johnson and another v Moreton [1978] 3 All ER 37, HL (refd)

Levolux AT Ltd v Ferson Contractors Ltd [2003] EWCA Civ 11; [2003] WL 116708; [2002] QBD 341, CA (refd)

Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor [2011] 1 MLJ 486; [2010] 9 CLJ 637, CA (refd)

Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1, FC (refd)

McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd [2013] QSC 223, SC (refd)

McNab NQ Pty Ltd v Walkcrete Pty Ltd & Ors [2013] QSC 128, SC (refd)

R v Montila [2004] UKHL 50; [2005] 1 ALL ER 113, HL (refd)

SEF Construction Pte Ltd v Skoy Connected Pte Ltd [2010] 1 SLR 733, HC (refd)

Westwood Structural Services Ltd v Blyth Wood Park Management Co Ltd [2008] EWHC 3138, QBD (refd)

Legislation referred to

Building and Construction Industry Security of Payment Act [SG] ss 15(1), 16(1)
Construction Industry Payment and Adjudication Act 2012 ss 3, 4, 5, 6, 8(1), 10(1), (3), 12(2), (2)(b), (2)(c), (3), (6), 13(a), (c), 15, 18(1), 19, 19(1), (2), (3), (4), (5), 21, 23(1), 25(o), (p), 26(1), 27(1), (2), (3), 29, 30, 32(b), (d), 33, 35, 35(2)(a), (2)(b), 36(4)
Goods and Services Tax Act 2014
Housing Grants Construction and Regeneration Act 1996 [UK] ss 108(2)(a), (2)(c), (2)(d)
Interpretation Acts 1948 and 1967 s 17A
Powers of Attorney Act 1949 s 6(1)(a)
Rules of Court 2012

Lam Wai Loon (Paul Lee, Serene Hiew and Kevin Wong with him) (TG Lee & Assoc) in Originating Summons No 24C-40–11 of 2015 for the plaintiff.
Oon Chee Kheng (CK Oon & Co) in Originating Summons No 24C-41–12 of 2015 for the plaintiff.
Lam Wai Loon (Paul Lee, Serene Hiew and Kevin Wong with him) (TG Lee & Assoc) in Originating Summons No 24C-41–12 of 2015 for the defendant.
Oon Chee Kheng (CK Oon & Co) in Originating Summons No 24C-40–11 of 2015 for the defendant.

Lee Swee Seng J:

[1] As is not uncommon, an application by a successful claimant in an adjudication decision to enforce the decision would be met by the unsuccessful respondent applying to set aside the adjudication decision. Such was the case here where the respondent raised some interesting grounds in setting aside the adjudication decision made under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). It was argued that the adjudicator was late by three days in making his adjudication decision and as such the whole decision is void. It does not matter that the payment for the Goods and Services Tax ('the GST') came on the last day set for the making of the adjudication decision for the respondent contended that the adjudicator had no authority to withhold the release of the decision on account of the GST of the Kuala Lumpur Regional Centre for Arbitration ('the KLRCA') not having been paid before the decision was made.

[2] An equally interesting challenge to the adjudication decision was that the contract having been terminated by the respondent, it shall not be bound to make further payment to the claimant until a final account is determined upon completion of the works. It was initially argued as a jurisdictional point but later its learned counsel was prepared to merely contend that as there was no cause of action that had arisen on the payment claim in question, the

adjudicator should have dismissed the payment claim.

[3] There was also the submission made that there was a breach of natural justice when the adjudicator granted interest when there was no submission made on it by the parties though the claimant had claimed for it.

PROBLEM

[4] On 20 May 2015, the claimant served a payment claim on the respondent for a sum of RM4,035,381.87 in accordance with s 5 of the CIPAA. The claimant claimed for the unpaid works done under the letter of award dated 8 October 2014 incorporating scope of works and conditions of appointment and in accordance with s 36(4) of the CIPAA.

[5] The breakdown is as follows:

(a) payment certificate No 5 R1 dated 24 March 2015 amounting to RM1,805,866.65

Payment certificate No 5 R1 dated 24 March 2015 was issued to claimant by architect for works done with the amount of RM1,805,866.65. The due date for the payment of certified amount purported was 23 April 2015. The claimant alleged that they had not received any payment for the certified amount pursuant to item 5 of the letter of award and/or s 36(4) of the CIPAA. The interim certificate No 5 R1 was issued for works done comprising of general conditions and preliminaries, bored piles, pile caps and column stumps construction works; and

(b) progress claim No 6 dated 31 March 2015 amounting to RM2,229,515.22

Progress claim No 6 dated 31 March 2015 was submitted by claimant for works done to architect with the amount of RM2,229,515.22. The due date for the payment of progress claim was to be 30 April 2015. However, the claimant alleged that they have not received any payment for the claimed amount pursuant to item 5 of the letter of award and/or s 36(4) of the CIPAA. The progress claim No 6 was prepared for the same nature of works done.

[6] Pursuant to s 6 of the CIPAA, the respondent submitted their payment response dated 25 May 2015, refuting the payment claims. With respect to payment claim No 5 R1 the respondent reasoned that as the claimant's employment had been terminated by the architect in accordance with cl 25.0 of the PAM Building Contract 2006 vide their letter dated 17 April 2015, pursuant to cl 25.4(d), the respondent is not bound to make any further payment including payment which have been certified but not yet paid. With

respect to progress claim No 6, the respondent refuted the payment claim since payment recommendation from architect is still pending due to respondent's non-compliance to make the necessary submission to architect for his proper assessment, valuation and recommendation.

[7] Following the procedure laid down in CIPAA, the notice of adjudication dated 3 June 2015 was served on the respondent referring the above two payment claims for adjudication. The claimant filed its adjudication claim and the respondent filed its adjudication response disputing the whole of the adjudication claim. The claimant stated in its notice of adjudication the reliefs and remedies as summarised below:

(a) payments amounting to RM4,035,381.87 being payment for works done due to the claimant under the contract;

(b) interest on the unpaid amounts at the rate of 5% per month on a daily rest from 24 March 2015 from the date each payment was due to the date full payment is received, based on the usual court rate allowed by the courts; and

(c) all costs incurred by the claimant in referring to the dispute to adjudication, including but not limited to solicitors' cost, the registration and administrative fee of KLRCA, and the adjudicator's fee.

[8] The adjudicator in its decision dated 30 October 2015, allowed the claimant's claim under payment certificate No 5 R1 with an amount of RM1,805,866.65. He however dismissed the payment claim under progress claim No 6 as the payment claim was held to be premature. The adjudicator further decided that the adjudicated sum shall be due to the claimant on 16 November 2015. He also awarded interest at the simple interest of 4.2%pa on the adjudicated sum from 23 April 2015 until payment. Pursuant to s 18(1) of the CIPAA, the cost shall follow the event and so the adjudicator decided that the respondent shall bear 100% of the costs of the adjudication proceedings which included the sum of RM43,053.06 being the adjudicator's fees, RM9,127.26 being KLRCA's fees (including GST) and RM55,500 being party and party costs.

PRAYERS

[9] The two applications that came before this court are as follows:

(a) Originating Summons No 24C-40–11 of 2015 ('the enforcement application') where Econpile (M) Sdn Bhd ('Econpile'), as the claimant in the adjudication proceedings, seeks to enforce the adjudicator's decision dated 30 October 2015 against IRDK Ventures Sdn Bhd ('IRDK') as respondent in the adjudication proceedings; and

(b) Originating Summons No 24C-41–12 of 2015 ('the setting aside application') where IRDK seeks to set aside the adjudicator's decision. A

[10] By consent of the parties and for good reason the two applications were heard together with the setting aside application being heard first as it was conceded that if the setting aside application is dismissed by the court, then invariably the enforcement application would succeed, as one is the flip side of the other. Conversely if the setting aside application is allowed the court would invariably have to dismiss the enforcement application. B

[11] The parties shall be referred to as claimant and respondent as they were in the adjudication proceedings. C

PRINCIPLES

Whether an adjudication decision delivered within time but released to the parties only after the payment of GST for KLRCA's fees is void in the circumstances of the case D

[12] As the parties could not agree to the adjudicator, it was left to the adjudicating authority under CIPAA, which is the KLRCA, to appoint the adjudicator. That appointment of one Ir Katheresan Murugan was duly made on 25 June 2015 under s 23(1) of the CIPAA. The adjudicator then wrote to the parties in Form 6 of his appointment on 9 July 2015. That was for his acceptance of the appointment. He also indicated as required under s 23(2) the terms of his appointment. Paragraph 1 of Form 6 reads as follows: E F

> I, Ir Katheresan Murugan, hereby accept the appointment to act as adjudicator as per the *KLRCA's standard terms of appointment* and fees for the services of an adjudicator in force as of the date of this letter. My fees and expenses are as contained in the *Schedule (Regulation 6) KLRCA's Standard Fees For Services and Expenses of Adjudicator.* (Emphasis added.) G

[13] At any rate s 19(2) of the CIPAA further provides that if the parties and the adjudicator fail to agree on the terms of appointment and the fees of the adjudicator, the KLRCA standard terms of appointment and fees for adjudicators shall apply. H

[14] The attachment 1 to Form 6 sets out a calculation of his adjudication fees and the KLRCA administrative fee. The KLRCA administrative fee is 20% of the adjudicator fee plus 6% GST; the sum being RM8,610.61 + 516.64 = RM9,127.25. Under para 6 of Form 6, he then directed the parties to contribute and deposit with the Director of KLRCA in equal shares both his Fee and the KLRCA's administrative fee and GST within seven days from the receipt of the said notice. Form 6 is prescribed under the KLRCA adjudication I

rules and procedure made pursuant to ss 32(d) and 33 of the CIPAA. The KLRCA standard terms of appointment appears in Schedule II of the KLRCA adjudication rules and procedure. By accepting his appointment, both parties have agreed to the above KLRCA standard terms of appointment to apply to them and the adjudicator as well as the adjudication. Of special significance would be para 7(c) and (d) of the KLRCA standard terms of appointment, where the adjudicator shall be entitled to:

> ... (c) direct the parties to contribute and deposit with the Director of the KLRCA, anticipated fees and expenses in equal shares in advance as security;
>
> (d) exercise a lien on his decision until any outstanding fees and expenses, *including the KLRCA's administrative fee and any taxes as may be imposed by the Government, have been paid in full in accordance with* Section 19(5) *of the Act.* (Emphasis added.)

[15] Paragraphs 9 and 12 of KLRCA standard terms of appointment provides:

> 9. The adjudicator's fees and expenses incurred shall be paid in full prior to the delivery of the adjudication decision ...
>
> 12. The adjudicator shall determine the matter and serve his decision to the parties within the time period stipulated in Section 12(2) of the Act. The decision shall be made in writing and shall, *subject to the settlement of all outstanding fees and expenses, be served on the parties and the Director of the KLRCA.*

[16] I am in agreement with learned counsel for the claimant, Mr Lam Wai Loon, that it is clear from the agreed terms of appointment of the adjudicator, the parties have agreed to the adjudicator withholding the service/delivery of his decision until all the outstanding fees and expenses, including any taxes as may be imposed by the government, have been fully settled. This is also covered within the 'further time' which has been agreed by the parties to be accorded to the adjudicator for deciding the dispute and delivering his decision, pursuant to s 12(2)(c) of the CIPAA.

[17] For completeness s 12(2) of the CIPAA reads:

> Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within —
>
> (a) Forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is the later;
>
> (b) Forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or
>
> (c) *Such further time as agreed to by the parties.* (Emphasis added.)

[18] In the instant case, the adjudicator released his decision to the parties on 3 November 2015, after he was informed formally by the KLRCA that they have received the cheque from the respondent for the outstanding taxes payable by the respondent. In the circumstances, the claimant submitted that the adjudicator has complied with the KLRCA standard terms of appointment, which bind both the parties and the adjudicator, and that he had delivered his decision within the time as agreed by the parties pursuant to s 12(2)(c) of the CIPAA.

[19] Both parties have agreed that the adjudicator was obligated to make his decision by 30 October 2015, the extension that was consented to by both parties. On 6 October 2015, the adjudicator sent a reminder for payment by each party of RM258.32 being the GST to be deposited with KLRCA (pp 50–52 of affidavit in support of IRDK encl 2). The respondent IRDK had on 29 October 2015 sent an email to the adjudicator and copied it to KLRCA enclosing a scanned copy of the cheque for the amount of RM258.32 and the cheque was received by KLRCA the next day 30 October 2015. From exh TSR7 encl 2 at p 55, it appears that it was received by KLRCA at 5.30pm. On 30 October 2015 at 6.54pm, Econpile's solicitors wrote an email to adjudicator to request that the adjudicator's decision be issued 'forthwith' (para 17 of affidavit in support of IRDK).

[20] The adjudicator replied via his email dated 2 November 2015 at 4.58pm that the adjudicator's decision had already deposited with KLRCA on 30 October 2015. From the acknowledgment stamp of KLRCA on the letter of the adjudicator to KLRCA dated 30 October 2015 attaching Form 15 the adjudication decision and Form 16 delivery of adjudication decision, it would appear that the said decision had been delivered to KLRCA at 4.40pm. There was also a handwritten note of '4.40pm' written beside the rubber stamp of KLRCA. IRDK's cheque for RM258.32 only reached KLRCA on 30 October 2015 at 5.30pm and it reached the KLRCA's legal department on 2 November 2015. He further stated that he would release the adjudicator's decision the following day. The respondent's solicitors received the adjudicator's decision at 2.30pm on 3 November 2015.

[21] It should also be stated that the respondent's solicitors by their email of 7 October 2015 in replying to the adjudicator's email of 6 October 2015 requesting for an extension of time to make his decision, had also indicated their agreement to paying the GST and had gone on record that the respondent was in the process of preparing the cheque for the GST (p 48 of encl 2). As can be seen at p 54 of encl 2, the said cheque was dated 8 October 2015 and one wonders why it had taken such a long time to be sent to KLRCA. When asked on this, learned counsel for the respondent Mr C K Oon said he was not aware of the reason for such a delay.

[22] In line with the policy of a quick and speedy adjudication, s 12(3) of the CIPAA provides in clear language that an adjudication decision which is not made within the period specified in sub-s (2) is void. The method of delivery of an adjudication decision is as prescribed in s 12(6) of the CIPAA which reads:

> The adjudicator shall serve a copy of the adjudication decision, including any corrected adjudication decision made under subsection (7), on the parties and the Director of the KLRCA.

[23] The form to be used by an adjudicator for delivering his adjudication decison is prescribed under Form 16 of the KLRCA adjudication rules and procedure. This had been complied with by the adjudicator and the same was received on 30 October 2015 at 4.40pm by the KLRCA. There was no undue delay from the time the respondent paid the GST of KLRCA by a cheque which reached them on 30 October 2015 at 5.30pm to the release of the decision on 3 November 2015; 31 October and 1 November being a Saturday and Sunday respectively. 'Working day' in s 4 of the CIPAA has been defined to mean a calendar day but exclude weekends and public holidays applicable at the State or Federal Territory where the site is located.

[24] There is another novel argument raised by the respondent. It is that s 19 of the CIPAA only allows an adjudicator to withhold releasing his decision if his fees and expenses are not paid and not that of the KLRCA's tax which is GST in this case. Section 19(1) refers to '... fees to be paid to the adjudicator'. Section 19(2) refers to '... the fees to be paid to adjudicator'. Section 19(3) refers to '... the adjudicator's fees and expenses'. Section 19(4) '... of the fees in equal share ...'. Section 19(5) reads that 'Before releasing the adjudication decision to the parties, the adjudicator may require full payment of *the fees and expenses* to be deposited with the Director of the KLRCA'. (Emphasis added.) If the Legislature had used the words 'his fees and expenses' it would have been clearer of the meaning that it is the adjudicator's fees and expenses alone and not to include that of KLRCA.

[25] As has been observed earlier, this argument loses its sting because the terms of the appointment of the adjudicator which are contractually binding on the adjudicator and the parties are the terms set out in Schedule II of the KLRCA adjudication rules and procedure. Paragraph 7(d) of Schedule II of the KLRCA standard terms of appointment states that 'the Adjudicator shall be entitled to exercise a lien on his decision until any outstanding fees and expenses, *including the KLRCA's administrative fee and any taxes as may be imposed by the Government, have been paid in full in accordance with* s 19(5) of the Act. (Emphasis added.) Apparently KLRCA's own reading of s 19(5) of the CIPAA is that it is wide enough to cover the KLRCA's fees and taxes as well.

[26] Section 17A of the Interpretation Acts 1948 and 1967 states that:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[27] The legal maxim *noscitur a sociis* is to be applied to yield an interpretation that best promote the purpose or object of the rule in question. It was explained and applied by His Lordship Low Hop Bing JCA in *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* [2011] 1 MLJ 486 at pp 505–506; [2010] 9 CLJ 637 at pp 665–666, with respect to the interpretation of the word 'purchaser' in s 6(1)(a) of the Powers of Attorney Act 1949 as follows:

> Meaning Of 'Purchaser' Under s 6(1)
>
> [48] In my view, the borrower's submission, that the word 'purchaser' in s 6(1) of the PA Act 1949 refers to a purchaser of property and not to a lender such as the bank or other category of persons, is a product of literal interpretation. I would construe the word 'purchaser' in accordance with *the maxim, noscitur a sociis, which means it is known from its associates. This maxim allows the word to take colour and precision from the context in which it appears.* The 'purchaser' in the context of s 6(1) necessarily means the purchaser of the PA with which the PA Act 1949 is concerned. The bank herein has given valuable consideration in the form of the loan which the borrower has obtained from the bank and has no doubt utilised, enjoyed and benefited from it. The bank is indeed the purchaser of the PA in which the borrower is the donor and the bank, as purchaser, subsequently becomes the done. This construction is in complete consonance with the purposive approach which has been enacted in s 17A of the Interpretation Acts 1948 and 1967 (with effect from 25 July 1997 vide Act A996) in the following words ...

[28] Applying the above principle to the purpose of the Act which is to promote the efficient delivery of an adjudication decision, it makes good sense that not just the adjudicator's fees and expenses be paid but also that GST on his fees be paid as well, if the adjudicator is a GST registered person. Surely the word 'expenses' is broad enough to cover even taxes imposed by the government and that includes GST as well. Moreover Schedule IV of the KLRCA Adjudication Rules and Procedure at para 8.3 provides that the adjudicator will only be paid the adjudicator fee when KLRCA has obtained full payment of the fees and expenses from the parties. The 'expenses' would include the GST of KLRCA as well. If GST on the adjudicator's fees is to be paid before releasing of his decision, then by extension and giving the section an expansive interpretation to promote the purpose of the Act, the fees, expenses and tax of KLRCA should also by the same token be paid.

[29] If there is some doubt as to the exact scope of s 19(5) of the CIPAA, one may turn to r 9 sub-r 5 on 'Fees and Expenses' of the KLRCA Adjudication Rules and Procedure which reads:

> 5 In the event full payment of the fees and expenses, *including the KLRCA's administrative fee and any taxes as may be imposed by the Government,* are not deposited with the Director of the KLRCA under section 19(5) of the Act, the adjudicator shall not release the adjudication decision to the parties. (Emphasis added.)

[30] The marginal note or section heading to s 19 refers to 'Adjudicator's Fees and Expenses, etc'. The word 'etc' can include the adjudicator's fees, expenses and his tax and well as the adjudication's fees, expenses and tax which would cover KLRCA's fees, expenses and tax. Whilst at one time there was some reticence and indeed a refrain from referring to marginal notes or section heading as an aid to interpretation of statute, the current approach seems to suggest a paradigm shift in the position, approving of its use as a helpful resource and reference tool when the section itself could be made clearer. This change in approach was captured by the House of Lords in *R v Montila* [2004] UKHL 50; [2005] 1 All ER 113 as follows:

> 31. Then there are the headings to each group of sections and the sidenotes, or marginal notes, to each section. The legislation which is in issue in this case was considered and published with sidenotes in the old form. In fact the sidenotes are sidenotes no longer. In 2001, due to a change in practice brought about by the Parliamentary counsel office, they were moved so that they now appear in bold type as headings to each section in the version of the statute which is published by *The Stationery Office*: see *Bennion on Statutory Interpretation* (4th ed, 2002) p 636. They appear in that form in the Bills that are presented to Parliament, and they also appear in that form in amendments which propose the insertion of new clauses into the Bill. But it remains true that, as Lord Reid said in *Chandler v DPP* [1962] 3 All ER 142 at p 145; [1964] AC 763 at p 789, these components of a Bill, even in their current form, are not debated during the progress of a Bill through Parliament. They are part of the Act when it has been enacted and they are descriptive of its contents. But they are unamendable: *Bennion*, pp 608 and 635–636.
>
> 32. Mr Perry for the Crown submitted that it was well settled that a sidenote in an Act of Parliament does not constitute a legitimate aid to the construction of the section to which it relates. Mr Grenfell QC for the appellants said that he was willing to concede the point. But this is not a concession that can be accepted. It was based on a dictum of Phillimore LJ in *Re Woking UDC (Basingstoke Canal) Act* 1911 [1914] 1 Ch 300 at p 322, where he said:
>
> > I am aware of the general rule of law as to marginal notes, at any rate in public general Acts of Parliament; but that rule is founded, as will be seen on reference to the cases, upon the principle that those notes are inserted not by Parliament not under the authority of Parliament, but by irresponsible persons.
>
> In *R v Hare* [1934] 1 KB 354, at pp 355–356 Avory J said:
>
> > Headings of sections and marginal notes form no part of a statute. They are not voted on or passed by Parliament, but are inserted after the Bill has become law. Headnotes cannot control the plain meaning of the words of the enactment, though they may, in some case, be looked at in the light of preambles it there is

any ambiguity in the meaning of the sections on which they can throw light. A

33. These observations were not wholly accurate at the time they were made, and they are out of keeping with the modern approach to the interpretation of statutes and statutory instruments. It is not true that headings and sidenotes are inserted by 'irresponsible persons', in the sense indicated by Phillimore LJ. They are drafted by Parliamentary counsel, who are answerable through the cabinet office to the Prime Minister. The clerks, who are subject to the authority of Parliament, are empowered to make what are known as printing corrections. These are corrections of a minor nature which do not alter the general meaning of the Bill. But they may very occasionally, on the advice of the Bill's drafter, alter headings which because of amendments or for some other reason have become inaccurate: *Bennion*, p 609. Nor is it true that headings are inserted only after the Bill has become law. As has already been said, they are contained in the Bill when it is presented to Parliament. Each clause has a heading (previously a sidenote) which is there throughout the passage of the Bill through both Houses. When the Bill is passed, the entire Act is entered in the Parliamentary Roll with all its components, including those that are unamendable. As *Bennion* states at p 638, the format or layout is part of an Act. B C D

34. The question then is whether headings and side notes, although unamendable, can be considered in construing a provision in an Act of Parliament. Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in Parliament. But it is another matter to be required by a rule of law to disregard them altogether. One cannot ignore the fact that the headings and side notes are included on the face of the Bill throughout its passage through the Legislature. *They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate. Subject, of course, to the fact that they are unamendable, they ought to be open to consideration as part of the enactment when it reaches the statute book.* E F

35. There is a further point that can be made. In *Pickstone v Freemans Plc* [1989] AC 66, Lord Oliver of Aylmerton said that the explanatory note attached to a statutory instrument, although it was not of course part of the instrument, *could be used to identify the mischief which it was attempting to remedy*: see also *Westminster City Council v Haywood (No 2)* [2000] 2 All ER 634, at p 645, para 19 per Lightman J. In *Coventry and Solihull Waste Disposal Co Ltd v Russell* [1999] 1 WLR 2093, at p 2103, it was said that an explanatory note may be referred to as an aid to construction where the statutory instrument to which it is attached is ambiguous. In *R (Wesminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, at p 2959B–C, Lord Steyn said that, in so far as the explanatory notes that since 1999 have accompanied a Bill on its introduction and are updated during the Parliamentary process cast light on the objective setting or contextual scene of the statute and the mischief at which it is aimed, such materials are always admissible aids to construction. It has become common practice for their Lordships to ask to be shown the explanatory notes when issues are raised about the meaning of words used in an enactment. G H I

36. The headings and side notes are as much part of the contextual scene as these materials, and there is no logical reason why they should be treated differently. That the law has moved in this direction should occasion no surprise. As Lord Steyn said

in that case, at p 2958, the starting point is that *language in all legal texts conveys meaning according to the circumstances in which it was used'.* (Emphasis added.)

[31] The following passage in *Bennion on Statutory Interpretation A Code* (5th Ed) by F A R Bennion! Lexis Nexis 2008 at s 256. Section name (sidenote, heading or title) p 747 has this helpful guide to the use of marginal note or section heading:

> A sidenote, marginal note or heading to a section is part of the Act. It may be considered in construing the section or any other provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore possibly inaccurate, guide to the content of the section. Due to a change of practice brought about by the Parliamentary Counsel Office at the beginning of 2001, sidenotes to sections have been replaced by headings.1 This does not effect any change in their status or use in interpretation.

[32] I would follow the cautious approach of his Lordship Edgar Joseph Jr FCJ in *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 at p 15 when he observed as follows:

> In *Bushell v Hammond* [1904] 2 KB 563, Collins MR suggested the approach to marginal notes when he said that a marginal note, while forming no part of the section, *was of some assistance as it showed the drift of the section.* Similarly, in *DPP v Schildkamp* [1971] AC 1; [1969] 3 All ER 1640; [1970] 2 WLR 279, Lords Reid and Upjohn were of the view that a marginal or side note will rarely be of any use in interpreting an Act but that *they should not be rejected completely as aids.* Lord Reid put this on the basis that it is the whole Act that is the product of the legislature and that therefore the whole Act can be looked at if any doubt should arise as to its meaning. (Emphasis added.)

[33] The adjudicator is empowered by r 9 sub-r 2 of the KLRCA Adjudication Rules and Procedure to require parties to deposit with KLRCA his fees and expenses in advance as security as well as the administrative fee payable to the KLRCA as provided in Schedule III of the KLRCA Adjudication Rules and Procedure. This he has to do by way of an issuance of a direction not later than fourteen days after his acceptance of the appointment. The adjudicator had done this by way of his attachment to Form 6 'Notice of Acceptance of the Appointment to Act as Adjudicator' dated 9 July 2015 as stated below:

> Pursuant to Construction Industry Payment & Adjudication Regulation 2014 Schedule-Regulation 6, KLRCA's Standard Fees for Service and Expenses of Adjudicator shall be adopted. The fee calculations are as shown below:
>
> Attachment 1
>
> a) Disputed Amount = RM4,035,381.87
>
> b) Adjudicator Fee = RM39,082 + (0.54% (RM4,035,381.87 - RM3,300,000))

	= RM39,082 + (0.54% (RM735,381.87))
	= RM39,082 + RM3,971.06
	= RM 43,053.06
c) KLRCA Administrative Fee	= 20% of above cost (b) + 6% GST
	= RM8,610.61 + 516.64
	= RM9,127.25
TOTAL FEE	= RM52,180.31

[34] As can be seen above the adjudicator had invoiced under one invoice his fees and expenses as well as the KLRCA's fees, expenses and tax, though separating the items. It seems odd, when both items in one invoice are to be paid as a security, to then allow the release of the adjudicator's decision only after his fees and expenses have paid eventhough KLRCA's GST has not been paid.

[35] Moreover as stated, this argument becomes academic when contractually parties have consented to such a term in their acceptance of the terms on the KLRCA's standard terms of appointment to apply to the adjudication.

[36] Arising out of that argument is the corollary argument that the rules of the KLRCA's Adjudication Rules and Procedure (in particular r 9 sub-r 5 and para 7(d) of Schedule II) which allows the adjudicator to 'exercise a lien on his decisliens until any outstanding fees and expenses, including the KLRCA's administrative fee and any taxes as may be imposed by the Government, have been paid in full in accordance with s 19(5) of the Act' is ultra vires the Act.

[37] The KLRCA Adjudication Rules and Procedure are made pursuant to ss 32 and 33 of the CIPAA. Section 32 deals with the 'Functions of KLRCA' whilst s 33 is on policy directions. Section 32 is set out below:

> Adjudication Authority
>
> 32 Functions of KLRCA
>
> The KLRCA shall be the adjudication authority and shall be responsible for the following:
>
> (a) Setting of competency standard and criteria of an adjudicator;
>
> (b) Determination of the standard terms of appointment of an adjudicator and fees for the services of an adjudicator;
>
> (c) Administrative support for the conduct of adjudication under this Act; and

(d) Any functions as may be required for the efficient conduct of adjudication under this Act.

[38] The KLRCA as the adjudication authority is clearly empowered under s 32(b) to determine the standard terms of appointment of an adjudicator and fees for the services of an adjudicator and under (d) any functions as may be required for the efficient conduct of adjudication under the Act. It cannot be argued that since the Act under s 19(3) does not expressly refer to non-payment of KLRCA's fees, expenses and tax as a ground for withholding the release of the adjudicator's decision, then the Adjudication Rules and Procedure that empowers the adjudicator to do so is null and void as in going beyond the powers conferred by the Act. As part of good corporate governance and the requirement to pay GST as may be required under the Goods and Services Tax Act 2014, it is fully in keeping with the efficient conduct and support of adjudication that all outstanding fees, expenses and tax both of the adjudicator and of the adjudication authority be paid before the adjudication decision be released to the parties. Indeed where parties have agreed to the default terms for the appointment of the adjudicator as in Schedule II of the KLRCA's standard terms of appointment when they proceeded with the adjudication after receipt of Form 6 and when the respondent further had agreed to pay when reminded of the non-payment via email from the adjudicator in October 2015, it seems a hollow argument now to pursue the point that the rules are ultra vires the Act.

[39] To be clear CIPAA does not prohibit the making of payment of KLRCA's fees, expenses and taxes as a condition precedent to the release of an adjudicator's decision and such a condition as has been introduced by the rules and the Schedule to the rules are in tandem with the function of KLRCA as the adjudication authority under CIPAA.

[40] In support of the contention that an adjudication decision made beyond the timeline provided for under CIPAA is void, learned counsel for the respondent urged this court to follow the strict time compliance approach of the Singapore courts under their Building and Construction Industry Security of Payment Act (Chapter 30) ('the SOPA'). As stated before the issue before this court is not so much a case where the deadline has not been met but whether in the case of a late payment of KLRCA's GST payment, the adjudicator has a right to withhold the adjudication decision and to only release it after being informed that the GST payment has been so made.

[41] In the recent Singapore's Court of Appeal's decision in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] SGCA 42, the lodgement of the adjudication response which was late by a mere two minutes was held to be invalid under SOPA. It must be borne in mind that the Singapore's position under SOPA with respect to an adjudication response being filed on time is

quite different from ours under our CIPAA. Under s 15(1) of the SOPA, it is provided as follows:

> 15(1) A respondent shall, within 7 days after receipt of a copy of an adjudication application under section 13(4)(a), lodge with the authorized nominating body a response to the adjudication application.

[42] Further under s 16(1) of the SOPA, it is stated clearly as follows:

> 16(1) An adjudication commences immediately upon the expiry of the period referred to in section 15(1) within which the respondent may lodge an adjudication response.
>
> (2) An adjudicator shall *reject* —
>
> (a) ...
>
> (b) *any adjudication response that is not lodged within the period referred to in* section 15(1). (Emphasis added.)

[43] Section 10(1) and (3) of the CIPAA provides as follows:

> 10(1) The respondent shall, within ten working days from the receipt of the adjudication claim under subsection 9(1), serve a written adjudication response which shall answer the adjudication claim together with any supporting document on the claimant.
>
> ...
>
> (3) If the respondent fails to serve any adjudication response, the claimant may proceed with the adjudication after the expiry of the time specified under subsection(1).

[44] Section 12(2)(b) of the CIPAA reads:

> Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within —
>
> (a) ...
>
> (b) Forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or ...

[45] Further under the powers of the adjudicator in s 25(p) of the CIPAA the adjudicator shall have the powers to:

> Extend any time limit imposed on the parties under this Act as reasonably required.

[46] Moreover under s 26(1) of the CIPAA it is expressly provided that:

> Subject to subsection (2), the non-compliance by the parties with the provisions of this Act whether in respect of time limit, form or content or in any other respect

shall be treated as an irregularity and shall not invalidate the power of the adjudicator to adjudicate the dispute nor nullify the adjudication proceedings or adjudication decision.

[47] Subject to the above riders, I have no problem accepting the principle that strict timeline under our CIPAA must be complied with as was clearly set out in the Singapore Court of Appeal case as follows in the context of SOPA:

> 28. Mr Lee sought to persuade us that as the filing of the Adjudication Response was only late by two minutes, the *de minimis* rule should apply here as well. We did not agree with Mr Lee's position. The scheme of the SOPA is to provide for speedy and temporary relief so as to minimise cash flow problems within the construction industry, leaving the parties' substantive rights to be determined on another occasion ...
>
> 29. It is in this light that timelines under the SOPA have to be strictly complied with. As held by the Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 (at p 42):
>
> > ... Where the Act itself states that certain material is not to be considered in certain circumstances, this must, as a matter of logic, have the effect of qualifying some other provision that imposes a general requirement that the principles of natural justice must be applied. In this context, there is no reason to construe s 16(3)(c) as foreclosing an adjudicator's power (indeed, his obligation) to act exactly as the Act contemplates in s 15(3). We should not strain the natural construction of the Act to accommodate cases such as the present, where a respondent has failed through his own lack of diligence to file a payment response. *Everyone in the building and construction industry must be aware, or at least taken to be aware, of the rigorous application of the timelines in the Act, and if they ignore them, they do so at their own peril.* (Emphasis added.)
>
> 30. While the way we had applied r 2.2 might seem harsh in light of the fact that the Respondent's filing of the Adjudication Response was merely two minutes late, we were of the view that having regard to the principle of *temporary finality* undergirding the SOPA, the strict application of the rule did not seem that draconian. Proceedings under the SOPA are meant to proceed at a good pace, and sums due under adjudication determinations are to be honoured and paid promptly. That was the whole object of the scheme. There might be a case for applying the *de minimis* rule if the substantive rights of the parties had been impinged, but here clearly the parties will have another chance to obtain redress by filing a substantive suit on the merits or have the matter submitted to arbitration. Accordingly, we held that there was no place for the *de minimis* rule to apply in this case.

[48] Learned counsel for the respondent also referred to the English case of *Epping Electrical Co Ltd v Briggs and Forrester (Plumbing Services) Ltd* [2007] EWHC 4 (TCC); [2007] BLR 126 where the Technology and Construction Court held that as the adjudicator had failed to issue his decision by 21 November 2006 which was the date the parties had agreed to his extension

of time and that as the decision was not issued until 23 November 2006, the adjudicator was out of time and in consequence, the adjudicator's decision was not enforceable. The relevant legislation in UK is the Housing Grants Construction and Regeneration Act 1996 [UK] where under s 108(2)(c) thereof it is provided that the adjudicator shall reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred. Section 108(2)(d) allows the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred.

[49] In answer to the issue posed at the outset, this court would hold that the adjudication decision was delivered within time and released to the parties soon after confirmation that the GST of the adjudication authority KLRCA had been paid which was consistent and in compliance with the KLRCA standard terms of appointment of the adjudicator as provided for under Schedule II of the KLRCA Adjudication Rules and Procedure contractually agreed to by the parties when receiving the notice of acceptance of the appointment to act as adjudicator in Form 6. The adjudication decision is thus validly made, delivered and released to the parties.

Whether the adjudicator has jurisdiction to decide on the payment claims when the contract has been terminated

[50] It was first submitted that this is a jurisdictional issue. Learned counsel for the respondent submitted that the whole scheme of CIPAA is premised upon there being in existence a valid contract that has not been terminated. It was further argued that once a construction contract has been terminated, adjudication is no longer available and parties will have to proceed with arbitration or litigation to resolve pending claims.

[51] However, just because there is no express provision in the CIPAA to say that it is applicable in cases where the construction contract has been terminated does not mean that the CIPAA is inapplicable when the contract has been terminated. An argument from silence is a dangerous thing to do, whether it be in the interpretation of statute or of sacred text. If the legislature had wanted the CIPAA to cease to apply upon the termination of the construction contract, it could easily had stated so. Section 3 is on 'Non-application' of the Act and it could have been inserted that the Act does not apply once the construction contract has been terminated.

[52] It was argued on behalf of the respondent that various provisions in the CIPAA would only make sense if the construction contract is still in existence and subsisting such as ss 29, 30 and 35. Section 29 gives the claimant a right to suspend or reduce the rate of progress of performance if after having obtained

an adjudication decision in its favour and the adjudicated amount is not paid. Section 30 provides for the claimant to seek direct payment from the principal. Section 35 is a prohibition of conditional payment in that any conditional provision in a construction contract in relation to payment under the construction contract is void. This provision appears to be in favour of the CIPAA applying eventhough the construction contract has been terminated and there is a clause in the construction contract to say that any payments certified but not paid would not be paid after the termination of the contract until the works are completed and final accounts are issued.

[53] The fact that these various provisions do not make make much sense if a construction contract has been terminated is no justification for saying that the moment a construction contract is terminated, then the CIPAA does not apply and the adjudicator has no jurisdiction to adjudicate on a payment claim. By and large, most adjudication of a payment claim and correspondingly of an adjudication claim would be in cases where the construction contract is still in existence and subsisting. Conversely if a construction contract has been terminated, there would hardly be any new progress or payment claims that would be certified by the architect or whoever is the superintending officer ('SO'). What would be more critical would be whether a claim that had already been certified would be paid if it was already due for payment but not paid and thereafter the construction contract was terminated.

[54] Perhaps appreciating that it would be quite a long shot to sustain the argument that CIPAA does not apply once a construction contract has been terminated, learned counsel for the respondent on the day of clarification, mellowed his submission to this: that if a cause of action on a payment claim has not arisen yet upon the termination of a construction contract, then the adjudicator has no jurisdiction to hear the claim. Much would then depend on the construction of the relevant clause in the construction contract that regulates the rights of the parties upon the termination of the contract. That then is not so much a question of jurisdiction but a question of construction which this court would generally not interfere even if this court were minded to arrive at a different interpretation.

[55] The matter having come before the adjudicator for adjudication of the two payment claims and payment responses, the adjudicator is entitled to proceed even if the respondent had framed the issue as a jurisdictional point for s 27(3) allows the adjudicator to do so. It reads:

> Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

[56] From the rationale and purpose perspective of the CIPAA, there is no good reason to exclude its application once the construction contract has been terminated. The long title to the CIPAA sets out its preamble and captures in a concise statement the prophylactics purpose of the Act which is to:

> ... to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.

[57] Regard may also be had to the explanatory statement to the Bill of Construction Industry Payment And Adjudication Act 2012 which reads:

> The Construction Industry Payment Adjudication Act 2012 ('the proposed Act') seeks to *facilitate regular and timely payment in respect of construction contracts* and to provide for speedy dispute resolution through adjudication. The purpose of the proposed Act is to *alleviate payment problems that presently prevails pervasively and which stifles cash flow in the construction industry.* The proposed Act further provides default payment terms in the absence of provisions to that effect and *prohibits conditional payment terms that inhibit cash flow.* The Act also seeks to *provide remedies for the recovery of payment upon the conclusion of adjudication*. (Emphasis added.)

[58] Unscrupulous contractors would have a predilection to terminate a construction contract if that has the potent effect of preempting adjudication and with that a need to make payments forthwith on the pain of execution. Of course, any wrongful termination would finally result in damages to be paid, but that can wait for some contractors, for so long as his current cash flow is not adversely affected. That would skirt the application of CIPAA at a time when it is needed most by the claimant for survival when without the cash flow for work done, it would be suffocating and the claimant may have to slow down, suspend or even stop work altogether.

[59] The issue had been raised in Singapore under their SOPA in *AU v AV* [2006] SGSOP 9, where a construction contract was terminated and a claim was made under SOPA. Philip Jeyaretnam SC concluded that he had jurisdiction under SOPA to hear the claim. His reasoning was as follows:

> [13] I also noted to both counsel in the course of the hearing that while the New South Wales Act expressly included within the definition of 'progress payment' 'the final payment for construction work carried out', our Act did not. Nonetheless, I am of the view that *the Act does apply even after a contract is terminated. First, the intention to protect cash flow would not be achieved if the interpretation put forward by the Respondent is adopted. If cash flow is blocked on one project, that will affect a contractor or service provider's financial resources for other projects.* Secondly, although one always speaks of termination of a contract when it is really the right and obligation to do work and be paid for it which is terminated for the future, the

contract continues to govern the relationship between the parties in relation to the work already done.

[60] It was conceded that there are authorities in England that suggest that an adjudicator can still proceed with an adjudication and produce his 'determination' even if the underlying construction contract has been terminated. This line of authorities, it was submitted, were premised on the provision of the English Act that provides that the adjudication can be proceeded 'at any time' (see s 108(2)(a) of the Housing Grant Construction and Regeneration Act 1996 [UK] ('the HGCRA').

[61] However the rationale set out in *A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* [1999] Lexis Citation 3443; [2000] 16 Const LK 199 QBD (TCC) is clear. There Wilcox J of the UK Technology and Construction Court observes as follows:

> 18. Even if the contract had been terminated, the matters referred to the adjudicator remain disputes under the contract. Where there is a contract to which the Act applies, as in this case, and there are disputes arising out of the contract to be adjudicated, the adjudication provisions clearly remain operative just as much as an arbitration clause would remain operative.
>
> 19. Had it been the intention of Parliament to limit the time wherein the party could give notice of his intention to refer a matter to adjudication, in the exercise of his right under s 108(1), it could have imposed a clear limit. Precise limits as to the appointment of Adjudicators and the time tabling of the process of adjudication are clearly set out in the Scheme. By contrast there is no such limitation under the Act or the Scheme as to when a notice of intention to refer a matter to adjudication may be made. By analogy, with arbitration provisions, there is clear authority to the proposition that those terms governing reference to arbitration survive the determination of the contract. See *Heyman v Darwins Ltd* [1942] AC 356; [1942] 1 All ER 337. Doubtless the position in relation to arbitration was in the minds of the legislators when the clear words of s 108 were enacted.

[62] For the reasons given above, I am not inclined to follow the contrary position taken by the Queensland Supreme Court in holding that upon the termination of a contract, the adjudicator has no jurisdiction to adjudicate on an outstanding claim as exemplified in *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 223 and *McNab NQ Pty Ltd v Walkcrete Pty Ltd & Ors* [2013] QSC 128.

[63] Under our CIPAA, an adjudication is premised on there being a 'payment claim'. A 'payment claim' is explained in s 5 of the CIPAA as follows:

> Payment claim
>
> 5(1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.

(2) The payment claim shall be in writing and shall include —

(a) the amount claimed and due date for payment of the amount claimed;

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

(c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act.

[64] Once a 'payment claim' is made and the time frame for a 'payment response' is over under s 6, the unpaid party may proceed with adjudication of the payment claim by filing a notice of adjudication under s 8(1). The adjudicator derives his jurisdiction from his appointment in this case by the KLRCA under s 21. He has the jurisdiction to hear the adjudication claim under s 27(1) and by extension under s 27(2). It is then for the adjudicator to decide whether the payment claim should be allowed in the light of the evidence in support and the adjudication response filed.

The following passage in *Construction Adjudication in Malaysia, CCH a Wolters Kluwer Business*, by the learned authors Lam Wai Loon and Ivan YF Loo, at p 74 is a helpful approach to making a payment claim necessary for triggering an adjudication process:

'the amount claimed and due date for payment of the amount claimed'

4.26 The unpaid party is required to state in his payment claim the amount claimed and the due date for payment of the amount claimed. These requirements necessarily imply that every construction contract should provide an adequate mechanism for determining what, when and how payments are due under the construction contract. In the absence of such terms, of if the contract does not provide an adequate mechanism for determining what, when and how payments are due under the construction contract, the default provisions on the terms of payment provided by section 36(1) of the CIPA Act 2012 would be imported into the construction contract.

4.27 *The unpaid party is only required to state in the payment claim the amount claimed to be due. It does not matter whether the amount claimed may not in law be due. The right of an unpaid party to serve a valid payment claim is predicated on an amount being claimed, and not on there being an actual entitlement to the amount so claimed.* Therefore, the fact that a payment claim also includes amounts which the claimant is not entitled to claim under the construction contract does not affect the validity of the payment claim. The unpaid party's entitlement will be adjudicated upon and determined by the adjudicator in the adjudication proceedings. The 'due date' for payment of the amount claimed refers to the date by which payment should be made. Thus, if the construction contract provides that payment of a progress payment certificate should be made within 30 days from the date of the certification, then the due date for payment of a progress payment certificate is the 30th day from the date of the certification of the progress payment certificate. However, the fact that a payment claim also includes amounts which the unpaid

party is not entitled to claim does not affect the validity of the payment claim. (Emphasis added.)

[65] Following the prescribed format in Form 15 sample format of an adjudication decision of the KLRCA Adjudication Rules and Procedure the adjudicator had succinctly summarised the issues before him as follows:

H. ISSUES

18. By reference to the submitted Payment Claim and Payment Response, the salient issues requiring the determination of the Adjudicator are summarised as below:

(a) Interim Certificated No 5 R1 dated 24 March 2015

Interim Certificate No 5 R1 has been issued to Claimant for works done on 24 March 2015 by Architect with the amount of RM1,805,866.65. The due date for the certified amount supposed to be 23 April 2015, 30 days from certified date. However, the Claimant alleged that they have not received any payment for the claimed amount pursuant to Item 5 of the Letter of Award and/or Section 36(4) CIPA Act 2012.

(b) Progress Claim No 6 dated 31 March 2015

Progress claim no 6 was submitted by Claimant for works done on 31 March 2015 to Architect with the amount of RM2,229,515.22. A payment certificate should be issued by Architect within 21 days which is 21 April 2015 and the due date for the certified amount supposed to be 20 May 2015, 30 days from certified date. However, the Claimant alleged that they have not received any payment certificate or payment for the claimed amount pursuant to Item 5 of the Letter of Award and/or Section 36(4) CIPA Act 2012.

(c) Contractual Rights after Purported Determination of Claimant's Employment

The Respondent has refuted to the Payment Claim on the basis that Respondent alleged Claimant's contract has been terminated, or Claimant's employment has been determined in accordance with Clause 25 of the PAM Building Contract. Therefore, *pursuant to Clause 25.4(d), the Respondent contends that he is not bound to make further payment including payment which have been certified but not yet paid.* (Emphasis added.)

[66] The adjudicator then proceeded to present his 'Findings and Reasons' as follows:

L. FINDINGS AND REASONS

35. *Issue 1: Termination of Contract and Validity of Payment Claim where the construction contract is no longer in existence*

a) Respondent has raised issue whether the Claimant is entitled to the claims under Payment Certificated No 5 R1 and Progress Claim No 6 after the alleged termination of the contract by referring to Section 27(1) CIPA Act 2012.

b) Respondent has also raised issue of the Adjudicator's jurisdiction in proceeding with and making decision in relation to Interim Certificated No 5 R1 and Progress Claim No 6.

c) Respondent has also raised a question whether an Adjudicator can proceed with adjudication proceeding and subsequently making a decision in relation to the claims submitted by way of the Payment Claim where the construction contract is *no longer in existence*.

Finding & Reason on Issue 1: Termination of Contract and Validity of Payment Claim where the construction contract is no longer in existence

a) Adjudicator, in his opinion, believes that Determination or Termination are terms always been mistakenly construed as being the same meaning and implications when in fact they are somewhat different and can be well distinguished. When used in the context of constructions contract, the word 'determination' is employed in connection with the bringing to an end the Contractor's employment under the particular contract. In determination, it is the Contractor's obligation and responsibility to carry out the works under the contract that is terminated and not the contract. The contractual and common law rights of the parties remained intact and are not invalidated due to the determination.

b) Therefore, in accordance with Clause 25.0 of PAM Building Contract (With Quantities) 2006 Edition, determination of contract by Employer is allowed as long it is not carried out *unreasonably or vexatiously*. It means that although the employment of the contractor has ended, the contract nevertheless still subsists but the rights and obligations of the parties are still governed by the post determination provisions as set out in the contract as stated in Clause 25.4.

c) As such, in accordance with Section 27(3) CIPA Act, and notwithstanding a jurisdictional challenge raised by the Respondent, the Adjudicator shall in his discretion to proceed and complete the adjudication proceedings without prejudice.

36. *Issue 2: Issuance of Notice of Default & Notice of Determination*

a) Respondent alleged the Claimant's performance has not been satisfactory which was highlighted through various correspondences from the Respondent's appointed Architect and Engineer.

b) Respondent also alleged due to the constant and repeated breaches of the Contract by the Claimant in the performance of the Contract, the Architect has issued to the Claimant a Notice of Default dated 13 April 2015 referenced YTT/irdk/ec/1404215, under Clause 25.1 of PAM Contract for the remedy of the breaches to the satisfaction of the Architect failing which the termination provision of Clause 25 of the Contract

would be invoked to terminate the Contract. However, the Architect alleged actual Notice of Default was issued on 3 April 2015 by referring to letter referenced YTT/idk/ec/19032015/03042015-2nd letter.

c) Accordingly, the Respondent has concluded that the Claimant has failed to remedy the specified breaches of the Contract as specified in the Notice of Default within the 14 days, and the Architect by way of a letter dated 17 April 2015 acting on behalf of the Employer has issued Notice of Determination purportedly had terminated the Contract, or, in the words of Clause 25 of the PAM Contract, determined the employment of the Claimant under the contract.

Findings & reasons on Issue 2: Issuance of Notice of Default & Notice of Determination

a) Adjudicator has reviewed numerous letters exchanged between the Claimant and Respondent's appointed Architect and Engineer pertaining to the Claimant's unsatisfactory performance. However, the issues related with performance of Claimant were not brought up during the submission of Payment Claim nor Payment Response.

b) Therefore, in accordance with Section 27(1) CIPA Act 2012 subject to subsection (2), the adjudicator's jurisdiction in relation to this dispute is *limited* to the matter referred to adjudication by both parties pursuant to Section 5 and 6. The Adjudicator shall bound (sic) within the limit of payment claim and payment response only since both parties did not attempt to extend the adjudicator's jurisdiction to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.

c) However, issuance of Notice of Default is a pertinent matter to be considered for decision to be made in regards with the submission of Payment Claim and Payment Response. As such, the Adjudicator in accordance with Section 27(3) CIPA Act 2012 and notwithstanding a jurisdictional challenge raised by the Respondent, the Adjudicator shall in his discretion to proceed and complete the adjudication proceedings without prejudice.

d) In accordance with Clause 25.2 of PAM Building Contract, upon the occurrence of any default under Clause 25.1, the Employer or Architect shall issue a written notice specifying the default. If the Contractor continues with such default for 14 days from the receipt of such written notice, the Employer may within 10 days from the expiry of 14 days to determine the employment of the Contractor by a further written notice.

e) Therefore, the Adjudicator in his opinion, finds that *Notice of Determination issued by Architect on 17 April and 20 April 2015 can only be effective on 27 April 2015,* after the expiry of 14 days from the issuance of Notice of Default issued on 13 April 2015. As such, pursuant with Section 25(d) and 25(m), the adjudicator is in his opinion, *the interim certificate No 5 R1 has become due for payment by 23 April 2015, before the Notice of Determination was issued.*

f) In addition, the Adjudicator also appreciates the primary objective of CIPA Act 2012 is to address cash flow problems in the construction

industry as highlighted by the Claimant. Since Interim Certificate No 5 R1 has been agreed upon by both parties before the Notice of Determination was issued and *it is not a final claim*, the Adjudicator in his discretion, finds the *interim certificate has reached its due date and should be made payable.*

37. *Issue 3: Certified Works Amounting to RM1,805,866.65 & Contractual Entitlement*

a) Claimant claims for an unpaid and certified works done. The Claimant has completed its works and submitted its 5th progress claim up to 9 March 2015. The Quantity Surveyor has valued and the Architect has duly certified the works whereby the Architect issued an Interim Certificate No 5 R1 dated 24 March 2015. This certified works amount to RM1,805,866.65.

b) Claimant alleges the Respondent should honour the Interim Certificate No 5 R1 within 30 days, namely by the 23 April 2015, as provided in Clause 5 of Letter of Award.

Findings & Reasons On Issue 3: Certified Works Amounting to RM1,805,866.65

a) The Claimant has obtained his Interim Payment Certificate No 5 R1 in accordance with Clause 30.1 of PAM Building Contract (With Quantities) 2006 Edition. As such, the Adjudicator does not find any arising issues to dispute the certified amount and work done since the Respondent did not raise any objection to the certified amount and work done during the Payment Response submission.

b) Therefore, the Adjudicator in his opinion, *believed the certified amount should be made payable to the Claimant within the Period of Honouring as provided in the contract, which is 30 days from payment certificate being issued by Architect. The due date was 23 April 2015 which happens before the effective date of Notice of Determination which is 27 April 2015.* (Emphasis added.)

[67] The adjudicator had given his reasons for concluding that interim certificate No 5 R1 that had been issued by the architect was due for payment before the termination of the employment of the claimant. As such cl 25.4 of the PAM Contract is ineffective in postponing the payment until the final accounts are ready and the works is completed. Rightly or wrongly that is a decision that the adjudicator is entitled to come to. He may be wrong and this court may disagree with him but that is for consideration at a litigation or arbitration arising out of the dispute where parties can fully ventilate on the validity of determination of the claimant's employment or the termination of the contract the case maybe. For the moment the decision of the adjudicator has a temporary finality to it and is enforceable. Section 13(a) of the CIPAA is clear in that the adjudication decision is binding unless it is set aside by the High Court on any of the grounds referred to in s 15. The avenue or forum for setting aside the temporary finality of a so-called 'wrong' interpretation of the

relevant clause in the construction contract that had resulted in a 'wrong' adjudication decision is at the arbitration or litigation stage as provided for under s 13(c) which reads:

> The adjudication decision is binding unless —
>
> (c) The dispute is finally decided by arbitration or the court.

[68] So much of cl 25.0 of PAM contract that is relevant to assist in appreciating the arguments of the adjudicator with particular emphasis on cl 25.4 is reproduced below:

> *Determination Of Contractor's Employment By Employer*
>
> *25.1 Defaults by Contractor*
>
> The Employer may determine the employment of the Contractor if the Contractor defaults in any of the following:
>
> 25.1(a) if without reasonable cause, he fails to commence the Works in accordance with the Contract;
>
> 25.1(b) if without reasonable cause, he wholly or substantially suspends the carrying out of the Works before completion;
>
> 25.1(c) if he fails to proceed regularly and/or diligently with the Works;
>
> 25.1(d) if he persistently refuses or neglects to comply with an Al;
>
> 25.1(e) if he fails to comply with the provisions in Clause 17.0; or
>
> 25.1(f) if he has abandoned the Works.
>
> *25.2 Procedure for determination*
>
> Upon the occurrence of any default under clause 25.1, and if the Employer decides to determine the Contractor's employment, the Employer or Architect on his behalf shall give to the Contractor a written notice delivered by hand or by registered post specifying the default. If the Contractor shall continue with such default for fourteen (14) Days from the receipt of such written notice, then the Employer may, within ten (10) Days from the expiry of the said fourteen (14) Days, by a further written notice delivered by hand or by registered post, forthwith determine the employment of the Contractor under the Contract. Provided always that such notice shall not be given unreasonably or vexatiously.
>
> *25.3 Contractor's insolvency*
>
> In the event of the Contractor becoming insolvent or making a composition or arrangement with his creditors, or have a winding up order made, or (except for purposes of reconstruction or amalgamation) a resolution for voluntary winding up, or having a liquidator or receiver or manager of his business or undertaking duly appointed, or having possession taken by or on behalf of the holders of any debentures secured by a floating charge, or of any property comprised in or subject to the floating charge, the employment of the Contractor shall be forthwith automatically determined.
>
> *25.4 Rights and duties of Employer and Contractor*

In the event that the employment of the Contractor is determined under Clause 25.1 or 25.3, the following shall be the respective rights and duties of the Employer and Contractor:

...

25.4(d) the Contractor shall allow or pay to the Employer all cost incurred to complete the Works including all loss and/or expense suffered by the Employer. Until after the completion of the Works under Clause 25.4(a), the *Employer shall not be bound by any provision in the Contract to make any further payment to the Contractor, including payments which have been certified but not yet paid when the employment of the Contractor was determined.* Upon completion of the Works, an account taking into consideration the value of works carried out by the Contractor and all cost incurred by the Employer to complete the Works including loss and/or expense suffered by the Employer shall be incorporated in a final account prepared in accordance with Clause 25.6. (Emphasis added.)

[69] For practical purposes, I accept the fact that there is no real difference between these two terms: 'determination of the employment of the Contractor under the Contract'; and 'termination of the Contract' as stated in *Hudson's Building and Engineering Contracts* (12th Ed) (2010) Sweet & Maxwell at p 1096, where the magnum opus of Construction Contract law, attributed this to poor draftsmanship and opined that the draftsmen making such distinctions have not in fact had any specific practical intention or distinction in mind.

[70] As admitted by learned counsel for the respondent, there could well be different interpretations of cl 25.4(d) especially with respect to the meaning of 'the Employer shall not be bound by any provision in the Contract to *make any further payment* to the contractor, including payments which have been *certified but not yet paid* when the employment of the Contractor was determined'. It could be that 'further payment' would not include payment certified and already due for payment but not paid and that such a payment is not affected by determination of the employment of the claimant as a contractor. It could also mean that 'further payment' would include all payments certified and due for payment but for whatever reason is not paid yet, then such a certified payment not paid yet eventhough due for payment need not be paid upon determination of the employment of the claimant as contractor.

[71] There is no ground for setting aside an adjudication decision in that the adjudicator has arrived at a wrong conclusion of payment due when the payment was not yet due or so much of it was not yet due by applying the wrong interpretation of law to the finding of facts. An adjudication decision may only be set aside by the High Court if it is improperly procured for the grounds stated in s 15 of the CIPAA. Section 15 provides as follows:

15 Improperly Procured Adjudication Decision

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

(a) The adjudication decision was improperly procured through fraud and bribery;

(b) There has been a denial of natural justice;

(c) The adjudicator has not acted independently or impartially;

(d) The adjudicator has acted in excess of his jurisdiction.

[72] Such is the approach too taken by the UK Technology and Construction Court in *Westwood Structural Services Ltd v Blyth Wood Park Management Co Ltd* [2008] EWHC 3138 involving cl 7.2.3 of the minor works form which is strikingly similar to our cl 25.4(d) of our PAM contract. There was a termination of the contract after the payment certified was due for payment. Coulson J of the TCC had to consider an argument by the employer that it was not obliged to make 'further payment' as provided in the contract after the contract had been determined by the employer. In rejecting the employer's argument, the learned TCC judge reasoned as follows:

> [4] Clause 7.2.3 of the Minor Works Form was the other term relevant to this dispute. It dealt with the payment position following determination by the employer. It provided:
>
> > Upon determination of the employment of the contractor under cll 7.2.1 or 7.2.2, the contractor shall immediately cease to occupy the site of the Works and the employer shall not be bound to make any further payment to the contractor that may be due under this agreement until after completion of the works and the making good of any defects therein. The employer may recover from the contractor the additional cost to him of completing the works and any expenses properly incurred by the employer as a result of, and any direct loss and/or damage caused to the employer by, the determination.
>
> [5] The relevant chronology is quite straightforward. The claimant contended that the works under the contract were practically complete on 15 January 2008 and relied on a letter from the contract administrator of that date as evidence of such practical completion. Two days later, on 17 January 2008, the contract administrator notified the claimant that there were concerns regarding the efficacy of the claimant's works and that an investigation was underway. In the meantime the contract administrator told the claimant not to carry out any further works. Curiously, the claims consultants acting on behalf of the claimant alleged that this letter amounted to a repudiation of the contact and the claimant thereafter left site.
>
> [6] On 16 April 2008 the claimant commenced adjudication proceedings seeking declarations that practical completion had been achieved on 15 January, and that the letter of 17 January was a repudiatory breach of contract. The claimant also sought the sums due for the balance of the works carried out as at 15 January 2008.
>
> [7] On 25 April the defendant's contract administrator sent to the claimant a letter purporting to determine the claimant's employment under the contract. The

defendant then sought to defend the claim in the adjudication by reference to cl 7.2.3, on the basis that no further sum was due until completion of what, by then, were called remedial works. However, the adjudicator properly decided that since the determination had occurred after the commencement of the adjudication, he did not have the jurisdiction to address it.

[8] Thus, in decision 1, dated 6 June 2008, the adjudicator decided that:

(a) although the contract administrator's letter of 15 January was not a practical completion certificate, practical completion had indeed been achieved on that date;

(b) the defendant did not repudiate the contract by the contract administrator's letter of 17 January;

(c) the sum of £40,000-odd plus VAT and fees was owing to the claimant in respect of work carried out up to 15 January, and should be paid by the defendant to the claimant by noon on 13 June 2008 (ie seven days later).

...

[10] The defendant commenced a second adjudication in front of the same adjudicator to deal with its determination claim and the argument pursuant to cl 7.2.3. Amongst other things, the defendant sought a decision that it was under no obligation to make any further payment to the claimant (including any sum found due in the first adjudication) unless and until the works had been completed by an alternative contractor. The claimant, on the other hand, argued that cl 7.2.3 was irrelevant because the clause dealt with sums which were due but not payable at the time of determination, whilst any sum due to the claimant pursuant to the first decision was both due and payable by the time of the service of the notice of determination on 25 April 2008.

[11] In his second decision dated 11 June 2008 ('decision 2'), the adjudicator found that:

(a) the defendant had validly determined the claimant's employment under the contract on 25 April;

(b) cl 7.2.3 'did not bite when the payment in question arose out of an adjudicator's decision';

(c) the expression 'further payment' in cl 7.2.3 meant future payment, and did not apply to any payment that became due before the determination.

For these reasons the adjudicator rejected the defendant's argument that the defendant was not bound to pay the sums identified in decision 1 as a result of the operation of cl 7.2.3.

[12] Notwithstanding the results of both decision 1 and decision 2, the defendant has failed to pay the sums found due by the adjudicator. Accordingly, the claimant seeks to recover those sums in these proceedings by way of summary judgment in accordance with CPR Pt 24.

[13] The principles as to enforcement of adjudicators' decisions are well known. They can be summarised as follows:

(a) the objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator': see para 85 of the judgment of Chadwick LJ in *Carillion Construction Ltd v Devonpot Royal Dockyard Ltd* [2005] EWCA Civ 1358; 104 ConLR 1; [2006] BLR 15.

(b) *An error of fact or law will not invalidate an adjudicator's decision. If the adjudicator has answered the right question in the wrong way, his decision will nevertheless be binding. It is only if he has answered the wrong question that his decision will be a nullity*: see the Court of Appeal decisions in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041, 73 ConLR 135, [2000] BLR 522 and *C & B Scene Concept Design Ltd v Isobars Ltd* [2002] EWCA Civ 46, 82 ConLR 154; [2002] BLR 93.

...

[19] First, I accept Mr Stansfield's submission that the adjudicator's decision in decision 2 involved two separate findings in respect of cl 7.2.3, as set out above. The first was that sums due pursuant to an adjudicator's decision are not caught by the words 'any further payment to the contractor that may be due' in cl 7.2.3. *Effectively he was deciding that sums awarded by an adjudicator were due in any event. The adjudicator may be right or he may be wrong about that but, again, that was a decision which he was entitled to reach. It cannot be impugned on this application.*

[20] Further, that conclusion is unaffected by the defendant's argument as to whether or not the adjudicator decided that the sum was due before 13 June 2008. Whatever the outcome of that debate, the adjudicator's conclusion, that the sum that he ordered to be paid by decision 1 essentially overrode the provisions of cl 7.2.3, is determinative of this application.

...

[22] The second complete answer to the point taken by the defendant is that the adjudicator has already ruled in decision 2 against the defendant's submission that their determination occurred before this sum was due, and that therefore they were entitled to rely on cl 7.2.3 as a defence to the claim. He has expressly ruled that they cannot rely on cl 7.2.3 to get round their obligation to pay.

[23] Again, although strictly speaking it is unnecessary for me to comment on that conclusion, I should add that I consider that the adjudicator may well have been right in reaching the conclusion that cl 7.2.3 was irrelevant on the facts of the case. After all, he found in decision 1 that the final date for payment of the amount due in the penultimate certificate was 12 February 2008. That was two and a half months *before* the determination of the contract by the defendant. In my judgment, *it would be contrary to the standard form of contract, and indeed to the Housing Grants, Construction and Regeneration Act 1996, to conclude that an employer was entitled to defeat a claim for sums due under the contract by reference to an event which occurred two and a half months after the money should have been paid'.* (Emphasis added.)

[73] Learned counsel for the claimant also cited *Johnson and another v*

Moreton [1978] 3 All ER 37, *Levolux AT Ltd v Ferson Contractors Ltd* [2002] QBD 341 and *Cubitt Building and Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 in support of the above proposition.

[74] In *Levolux AT Ltd v Ferson Contractors Ltd* [2003] EWCA Civ 11; [2003] WL 116708 the English Court of Appeal had to consider whether an adjudicator's decision should be upheld in a case where there had been termination of the contract in the light of provisions in the construction contract as follows:

> Clause 29.8 provides:
>
> If the contractor shall determine the Sub-Contract for any reason mentioned in clause 29.6 the following provisions shall apply:
>
> 1. All sums of money that may then be due or accruing due from the Contractor to the Sub-Contractor shall cease to be due or accrue due;
>
> Clause 29.9 provides:
>
> Until after completion of the Sub-Contract Works and the making good of defects as referred to in clause 14.3 the contractor shall not be bound by any provisions of the sub-contract to make any further payment to the sub-contractor.

[75] Lord Justice Mantell in his speech in the Court of Appeal reasoned as follows:

> 27. Mr Collings asks, rhetorically, whether there is any real reason that effect should not be given to those clear contractual provisions. He submits that there are three main exceptions to the principle that an adjudicator's decision is binding and enforceable pending final resolution by arbitration or litigation. These he identifies as (1) where the adjudicator did not have jurisdiction or failed to act fairly or in conformity with the applicable procedures, (2) the terms of the contract override the apparent obligation to make payment in accordance with the adjudicator's decision and (3) where the decision is overridden by another applicable adjudication.
>
> ...
>
> 30. But to my mind the answer to this appeal is the straight forward one provided by Judge Wilcox. The intended purpose of s 108 is plain. It is explained in those cases to which I have referred in an earlier part of this judgment. If Mr Collings and His Honour Judge Thornton are right, that purpose would be defeated. *The contract must be construed so as to give effect to the intention of Parliament rather that to defeat it.* If that cannot be achieved by way of construction, then the offending clause must be struck down. I would suggest that it can be done without the need to strike out any particular clause and that is by the means adopted by Judge Wilcox. *Clauses 29.8 and 29.9 must be read as not applying to monies due by reason of an adjudicator's decision*.

[76] The Singapore courts too have taken a similar approach in *SEF*

Construction Pte Ltd v Skoy Connected Pte Ltd [2010] 1 SLR 733, where Judith Prakash J held:

> 41. In my judgment, bearing in mind the purpose of the legislation, *the court's role when asked to set aside and adjudication determination or a judgment arising from the same, cannot be to look into the parties' arguments before the adjudicator and determine whether the adjudicator arrived at the correct decision. In this connection, I emphasise the intention that the procedure be speedy and economical. It would be recalled that one of the adjudicator's duties is to avoid incurring unnecessary expense. If the court were to be allowed to look into questions of substance or quantum including questions like whether a proper payment claim had been served by the claimant, the procedure is likely to be expensive and prolonged.* One can very easily envisage a situation (in fact such situations have already occurred) where the dissatisfied respondent first applies to the court for the adjudication determination to be set aside on the ground that, for example, the adjudication response should not have been rejected, and then when that application is rejected by the assistant registrar, appeals to the judge in chambers and finally when the appeal is unsuccessful, appeals again to the Court of Appeal. Bearing in mind that the adjudication process could have been a two-step process involving a review, that would mean five steps in all before the dispute regarding the claimant's payment claim is finally disposed of. The more steps there are, the longer the process will take and the more expensive it will be. Such an outcome would be contrary to the intention of Parliament that the adjudication procedure should afford speedy interim relief. (Emphasis added.)

[77] In our case too, keeping in mind the mischief that the CIPAA was designed to address ie to alleviate the cash flow problem in the construction industry for the unpaid party and to give a temporary finality to the payment claims I would follow an interpretation that would best promote the purpose and object of the Act than that which would not promote it in line with the requirement of s 17A of the Interpretation Acts 1948 and 1967 which states that:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[78] Further under s 35 of the CIPAA there is a prohibition of conditional payment. Section 35 reads as follows:

> (1) Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.
>
> (2) For the purpose of this section, it is a conditional payment provision when:
>
> (a) The obligation of one party to make payment is conditional upon that party having received payment from a third party; or
>
> (b) The obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party.

[79] Mr Oon for the respondent submitted that by a 'conditional payment' is meant the two definitions in s 35(2)(a) and (b) and nothing more. Mr Lam for the claimant submitted that it is open for the Court to interpret 'conditional payment' to be wider than the two instances provided in s 35(2)(a) and (b) and to interpret it expansively to cover all cases of a conditional payment term which has the effect of defeating the purpose of the Act.

[80] We are aware that when if the subsection had use the words '(2) For the purpose of this section, 'conditional payment' means —' then we are left in no doubt that the two examples are exhaustive and permits of no other additional instances of conditional payment terms. If that subsection had used the word 'includes' instead of 'means' we would also be quite clear and confident that the examples given are by no means exhaustive.

[81] However seeing that Parliament had chosen to state a general principle first in s 35(1) and has couched it to be all-encompassing as in the use of the expression '*Any* conditional payment provision ...' I would prefer a more expansive interpretation that would accord with the purpose of the Act. Parliament could have used the expression in s 35(1) as 'A conditional payment provision within the meaning of subsection (2) ... is void'. It could be safely concluded that Parliament had left it to the court to determine on a case by case basis as to whether a conditional payment term would be defeating the purpose of the Act.

[82] For instance if a conditional payment term is merely that the unpaid party as contractor must show proof of payment to his subcontractors before the employer needs to pay the contractor, such a condition might not be unreasonable and might be good in enhancing corporate governance and efficiency in contracts management. There might well be a myriad of conditions not all of which would be defeating the purpose of the Act. In fact the explanatory statement to the bill reads: 'The proposed Act further provides default payment terms in the absence of provisions to that effect and *prohibits conditional payment terms that inhibit cash flow'.* (Emphasis added.)

[83] On the contrary, a condition like cl 25.4(d) has the effect, upon the termination of the contract, of postponing payment due until the final accounts are concluded and the works completed and that would be defeating the purpose of the Act. Therefore such a clause is void and unenforceable and the adjudicator may disregard it altogether.

[84] The adjudicator had also given his reasons for dismissing the payment claim No 6 as follows:

38. *Issue 4: Certified Works Amounting to RM2,229,515.22*

a) The Claimant has submitted its 6th progress claim to the Architect on 31 March 2015 amounting RM2,229,515.22. The Claimant alleges the works are completed but yet to be certified by the Architect.

b) Hence the Claimant contended that in the absence of the terms of payment, the statutory default provision Section 36(1) of CIPA Act 2012 shall be used.

c) Respondent's appointed Quantity Surveyor has issued Draft Recommendation of Interim Valuation No 6 dated 17 April 2015 with a valued amount of RM1,197,545.81.

d) Respondent's appointed Architect has issued *Certificate of Non Compliance* dated 22 May 2015 which certifies that Claimant has failed to complete works as per contract by the extended contract completion date of 5 April 2015.

Findings & Reasons on Issue 4: Certified Works Amounting to RM2,229,515.22

a) Architect has not issued any interim certificate No 6 since Notice of Default has been issued on 13 April 2015. Adjudicator is in his opinion agreeable that Architect has acted within the rights as provided in Clause 25.6 of PAM Building Contract (With Quantities) 2006 Edition which requires Final Account to be finalised prior any further payments to be released.

b) Meanwhile on the issue of terms of payment, the Adjudicator is agreeable with the Respondent's contention that statutory default provision under section 36(1) CIPA Act 2012 *may not be applicable* since Clause 30.1 PAM Building Contract has provided its own Period of Honouring or *30 days* upon the issuance of interim certificate by the Architect.

[85] The adjudicator had taken the view that since the payment had not been certified by the architect yet and further that since the architect had issued a notice of default, the payment is not due yet. It is something within the province and purview of the adjudicator to decide and any error of fact or law or of both fact and law may be corrected at the final arbitration or litigation where all outstanding issues may be ventilated to finality. In any event the claimant had not applied to set aside this part of the adjudication decision dismissing its claim in payment claim No 6 and so no further comments would be necessary.

Whether there has been a breach of rules of natural justice when the adjudicator allowed interest on the adjudicated sum

[86] The claimant submitted that the respondent's allegation that the adjudication decision should be set aside on ground of breach of rules of natural justice is untenable because:

(a) first, the parties were given opportunity to address the adjudicator on the issue of interest;

(b) secondly, awarding interest is within the power of the adjudicator, pursuant to s 25(o) of the CIPAA; and

(c) thirdly, and in any event, there is no material breach of the rules of natural justice.

[87] To begin with, the claimant had claimed interest at the rate of 5%pa on the unpaid amounts from the date each payment was due to the date full payment is received. The claimant had submitted the Chief Justice of Malaysia Practice Direction No 1 of 2012 dated 31 July 2012 with respect to determination of interest under the Rules of Court 2012 which states the rate of interest of 5%pa with effect from 1 August 2012.

[88] The claimant had also submitted PAM Building Contract (With Quantities) 2006 Edition which provided in cl 30.17 on interest whereby '… a simple interest based on the Maybank Base Lending Rate plus one (1) percent shall be payable by the defaulting party on such outstanding amount until the date payment is made'. The parties were invited to file their written submissions and if the respondent had not addressed the issue of interest payable and if so at what rate, then they cannot cry foul and complain when the adjudicator awarded interest on the amount found to be due. The adjudicator under s 25 shall have the powers to —

…

(d) Draw on his own knowledge and expertise;

…

(i) Inquisitorially take the initiative to ascertain the facts and the law required for the decision;

…

(o) Award financing costs and interest; …

[89] There was nothing improper and much less a breach of the rules of natural justice for the adjudicator to have referred to Maybank's webpage www.maybank2u.com.my for the Maybank's base lending rate which was 3.20% with effect from 2 January 2015. The adjudicator concluded as follows:

k) Accordingly, the Adjudicator holds that interest stated in the PAM Building Contract shall take precedence being a binding contract between the contracting parties and therefore a simple interest of 4.2% per annum on yearly rest shall be applied on the sum of RM1,805,866.65 from the date payment certificate No. 5R1 becomes due, 23 April 2015.

[90] I cannot see how in arriving at his decision on interest to be awarded, the adjudicator could be said to have acted in breach of the rules of natural justice. I would follow the guidelines laid down in the case of *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC) as follows:

> [57] From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:
>
> (a) It must first be established that the Adjudicator failed to apply the rules of natural justice;
>
> (b) Any breach of the rules must be more than peripheral; they must be material breaches;
>
> (c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.
>
> (d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.
>
> (e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth* was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no beach of the rules of natural justice in relation thereto.

PRONOUNCEMENT

[91] Taking all the submissions of the parties as a whole, I was constrained to dismiss the application in Originating Summons No 24C-41–12 of 2015 to set aside the adjudication decision and correspondingly, to allow the claimant's application to enforce the adjudication decision in Originating Summons No 24C-40–11 of 2015. As both the applications were being together I granted a single costs of RM10,000 to be paid by the respondent IRDK to the claimant Econpile and the allocator is to be paid before extraction of order of costs.

Application to set aside the adjudication decision dismissed and claimant's application to enforce the adjudication decision allowed with costs of RM10,000.

Reported by Kohila Nesan